

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TOMMY JOHNNY EMORY,

Defendant-Appellant.

UNPUBLISHED

April 24, 2012

No. 303824

Kalamazoo Circuit Court

LC No. 2010-001366-FC

Before: BECKERING, P.J., and OWENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for two counts of second-degree murder, MCL 750.317, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to 20 to 50 years' imprisonment, with credit for 253 days, for each count of second-degree murder; and two years' imprisonment for each count of felony-firearm. Defendant's sentences for second-degree murder are to run concurrently with each other and consecutively to his sentences for felony-firearm; and defendant's sentences for felony-firearm are to run concurrently with each other, and are to precede his sentences for second-degree murder. We affirm.

On August 1, 2010, at about 4:30 a.m. the two victims, Sheron Wright and Lawonda Rogers, parked their respective cars on the side of Elizabeth Street in Kalamazoo, got out of their vehicles, and began a conversation. Defendant came out of his nearby house and told the victims to leave. An argument ensued and defendant drew a gun and shot Wright. Rogers then got into the passenger seat of her car, but defendant approached Rogers' car and shot her four times. Defendant subsequently shot Wright two more times. The police arrived shortly thereafter, and defendant admitted to shooting and killing both victims.

Defendant first argues that his trial counsel denied him the effective assistance of counsel by failing to request a jury instruction on the lesser offense of voluntary manslaughter. We disagree.

Defendant did not preserve this issue by moving for a remand or a *Ginther*¹ hearing. *People v Musser*, 259 Mich App 215, 220-221; 673 NW2d 800 (2003). “A claim of ineffective assistance of counsel is a mixed question of law and fact. A trial court’s findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo.” *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008) (citation omitted). This Court’s review of defendant’s unpreserved ineffective assistance of counsel claim “is limited to mistakes apparent on the record.” *Id.* “To establish ineffective assistance of counsel, the defendant must first show: (1) that counsel’s performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different.” *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008).

In light of defendant’s testimony that he shot the victims out of fear for his life, we find that a jury instruction on the lesser offense of voluntary manslaughter would have been appropriate. *People v Moore*, 189 Mich App 315, 320; 472 NW2d 1 (1991) (“[T]he jury may consider the lesser charge if there is only a modicum of evidence of provocation.”). However, to show that defense counsel’s performance was deficient, defendant must “overcome the strong presumption that his counsel’s action constituted sound trial strategy under the circumstances.” *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). We have recognized that a defense counsel’s choice to argue for full acquittal on the facts of the case may be sound trial strategy. See *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Here, requesting a jury instruction on the lesser offense of voluntary manslaughter would have reduced defendant’s chance of a full acquittal. We find that defendant has not overcome the “strong presumption” that his trial counsel’s decision not to request a voluntary manslaughter instruction constituted sound trial strategy under the circumstances. *Toma*, 462 Mich at 302.

Moreover, we find that defense counsel’s failure to request an instruction on voluntary manslaughter was not outcome determinative because the evidence did not support a finding of voluntary manslaughter. *Yost*, 278 Mich App at 387. Defendant argues on appeal that the victims verbally threatened to kill him and that he believed that they both possessed weapons, which provoked defendant to act under the heat of passion as required for voluntary manslaughter. *People v Roper*, 286 Mich App 77, 87; 777 NW2d 483 (2009). However, eye witnesses testified that defendant shot both victims while they were trying to leave, and expert testimony confirmed that defendant shot both victims in the back multiple times. Moreover, there was no evidence that either victim possessed a weapon at the time of the shooting. The jury rejected defendant’s self-defense theory, finding that defendant was not acting out of a reasonable fear for his life. Thus, we find that defendant cannot establish a reasonable probability that the jury would have found that the victims’ conduct would provoke a reasonable person in defendant’s situation to lose control as required for voluntary manslaughter. *Id.*

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant next argues that the prosecution failed to present sufficient evidence that he committed the shootings with malice, as required to support his conviction of second-degree murder. We disagree.

This Court reviews de novo a claim of insufficient evidence. *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). “[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Further, “when reviewing claims of insufficient evidence, this Court must make all reasonable inferences and resolve all credibility conflicts in favor of the jury verdict.” *People v Solmonson*, 261 Mich App 657, 661; 683 NW2d 761 (2004).

“Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.” *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). At trial, defendant did not contest that he acted with malice, but rather admitted that he intentionally shot both of the victims multiple times. Additionally, the jury could infer malice from defendant’s use of a deadly weapon. *People v Bulls*, 262 Mich App 618, 627; 687 NW2d 159 (2004). The jury rejected self-defense as an explanation for defendant’s actions. Viewing the evidence in the light most favorable to the prosecution, we find that the prosecution presented sufficient evidence for a rational trier of fact to find that the prosecution proved malice beyond a reasonable doubt. *Wolfe*, 440 Mich at 515.

Affirmed.

/s/ Jane M. Beckering
/s/ Donald S. Owens
/s/ Amy Ronayne Krause